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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 233

DONALD M. POSEGATE AND IDA J. POSEGATE, HUSBAND AND WIFE, *Petitioners*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. B) is reported at 288 F. 2d 11.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1961. On June 22, 1961, the time to file a petition for certiorari was extended by Mr. Justice Douglas to and including July 17, 1961. The petition for certiorari was filed on that date.

QUESTION PRESENTED

Whether the Federal Employees' Compensation Act provides the exclusive remedy against the United States for a federal employee who has been injured in the course of his employment.

STATUTE INVOLVED

The pertinent portions of Sections 1 and 7 of the Federal Employees' Compensation Act of September 7, 1916, as amended, 5 U.S.C. 751, *et seq.*, provides in pertinent part:

> Section 1:
>
> (a) The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty * * *
>
> Section 7:
>
> * * * * * * * * *
>
> (b) The liability of the United States * * * with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute * * *.

STATEMENT

Petitioner Donald M. Posegate was employed at an Army electronic testing center in Arizona. On February 26, 1958, while helping to move an Army field

piece in the course of his employment, he was trapped by the right front wheel, thrown to the ground, and run over. He suffered a fractured pelvis, ruptured bladder and urethra, and other injuries which allegedly rendered him impotent. Thereafter, he applied for and received compensation under the Federal Employees' Compensation Act.

On May 7, 1959, he instituted this action under the Federal Tort Claims Act to recover damages for his alleged impotency.[1] The complaint charged that the accident had been occasioned by the negligence of employees of the government. In petitioner's view, his receipt of compensation under the Compensation Act did not bar the tort claim because, according to information which he had received, the coverage of that Act does not extend to impotency.

The district court granted the government's motion to dismiss the complaint for failure to state a cause of action. The court of appeals affirmed, holding that by reason of Section 7 of the Compensation Act, *supra*, p. 2, the petitioner's exclusive remedy for the injuries sustained lay under that Act.

ARGUMENT

Petitioner Donald Posegate is a federal employee who was injured in the course of his employment and has admittedly applied for and received compensation benefits under the Federal Employees' Compensation Act. Both courts below have held that the remedy provided by that Act is exclusive and precludes a

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[1] In a separate count in the complaint, petitioner's wife sought damages for loss of comfort and consortium. That claim was subsequently abandoned and is not before this Court (Pet. 3). Mrs. Posegate states that she is a petitioner in this Court because of her community property interest (Pet. 3).

suit under the Tort Claims Act. We submit that this conclusion is clearly correct. The explicit terms of the Compensation Act, its legislative history, and the prior judicial interpretation all require the rejection of petitioners' theory that a federal employee may invoke the Tort Act to recover for those consequences of his injury which are not compensable under the Compensation Act.

1. Section 1 of the Compensation Act, 5 U.S.C. 751, makes the United States liable "for the disability or death of an employee, resulting from personal injury sustained while in the performance of his duty." Although the Act provides a comprehensive schedule of payments for various injuries, it makes no provision for payment for pain, suffering, non-disabling disfigurement, and loss of sexual power such as that suffered by petitioner (5 U.S.C. 753-756). Nonetheless, Section 7(b) of the Act, *supra*, p. 2, expressly states that "the liability of the United States" for such disability and death payments under the Compensation Act "with respect to the injury or death of an employee," while in the performance of duty, "shall be exclusive, and in place of all other liability of the United States to the employee * * * on account of such injury or death" in judicial proceedings "under any Federal tort liability statute." In other words, under the plain terms of the Compensation Act, the liability of the government to a federal employee injured in the course of his employment is limited to that provided by the Compensation Act.

2. Petitioner, however, would have Section 7(b) read as if it said that the liability of the United States "shall be exclusive, and in place, of all other liability of the United States to the extent that the injury is

compensable under the Federal Employees' Compensation Act." If Congress had intended that meaning it would have said so. That it did not so intend is evidenced by the Congressional reports which explained Section 7(b) when it was added to the Compensation Act in 1949. Act of October 14, 1949, c. 691, Title II, Section 201, 63 Stat. 861.

The Senate Committee on Labor and Public Welfare observed (S. Rept. No. 836, 81st Cong., 1st Sess., pp. 23, 30):

> * * * The purpose of [Section 7(b)] is to make it clear that the right to compensation benefits under the act is exclusive and in place of *any and all other legal liability* of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute. Thus, an important gap in the present law would be filled and at the same time *needless and expensive litigation will be replaced with measured justice*. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill.
>
> Workmen's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen's compensation legislation is that the remedy afforded is a substitute for the employee's (or dependent's) former remedy at law for damages against the employer * * *. * * * Since the proposed remedy would afford employees and their dependents a planned and substantial protection, to permit other remedies by civil ac-

> tion or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both the beneficiaries involved and the Government.
>
> * * * * * * * * *
>
> The saving to the Government by the elimination of costly and needless claims and litigation under the Federal Tort Claims Act, Suits in Admiralty Act, Public Vessels Act, and the like, which presently weigh heavily upon the Government and involve considerable expense to defend will be eliminated, offsetting in substantial part the increased cost in compensation benefits. [Emphasis added.]

The House Committee on Education and Labor was even more explicit that the liability of the government for injuries sustained by a federal employee in the course of his employment is restricted to that provided by the Compensation Act and that a tort action against the government is barred. At one point it was proposed to add the language "unless otherwise specifically provided by law" to the exclusivity provisions of Section 7(b). It was thought that this language would make certain that no other Act of Congress would be construed to confer a supplemental remedy on employees of the United States unless such other statute declared specifically that the remedy afforded by it was given in addition to the remedy under the Compensation Act. The phrase was criticized by the Federal Security Agency, which felt that it was superfluous and, additionally, that it might be construed as continuing the effectiveness of federal tort statutes with respect to government employees and thereby impair the exclusiveness of the remedy under the Compensation Act. After pointing out this objection,

the House Committee stated (H. Rept. No. 729, 81st Cong., 1st Sess., pp. 14-15):

> * * * The committee shares this view. It is the committee's purpose to have the language of such section 7 entirely clear in this respect so as to express the *committee's intention that the compensation remedy shall henceforth be the exclusive remedy of a person protected by this act against the United States, or against its instrumentalities in cases in which a suable instrumentality is the employer.* * * * [Emphasis added.]

It is, accordingly, apparent that Congress intended to provide compensation independent of fault for certain specified elements of damages, and that this compensation was to be exclusive and in lieu of all other governmental liability for damages—expressly including tort liability.

3. The only other court of appeals which has considered this precise problem agrees with the court below. In *Underwood* v. *United States*, 207 F. 2d 862 (C.A. 10), the husband of a federal employee who was killed in an airplane accident brought an action against the government under the Federal Tort Claims Act for loss of consortium. Since he was not a dependent widower, he had no remedy under the Compensation Act. Notwithstanding this fact, the Tenth Circuit held that his suit under the Tort Claims Act was barred because liability of the United States for the death of a federal employee in the course of his employment was exclusively defined by the Federal Employees' Compensation Act. Petitioner here was not totally deprived of a remedy as was the plaintiff in the *Underwood* case. Petitioner has admittedly collected payments under the Compensation Act for his dis-

ability, and there is even less reason in this case than in *Underwood* to depart from the explicit Congressional mandate.

As pointed out by the court below (Pet. App. B, pp. vii-viii), the Court of Appeals for the District of Columbia Circuit was confronted with the same problem in the context of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905, which is analogous to Section 7(b) of the Federal Employees' Compensation Act. In resolving the question in the same way as the Ninth and Tenth Circuits, the District of Columbia Circuit observed (*Smither and Co.* v. *Coles*, 242 F. 2d 220, 222-223 (C.A.D.C.), certiorari denied, 354 U.S. 914):

> The history of the development of statutes, such as this, creating a compensable right independent of the employer's negligence and notwithstanding an employee's contributory negligence, recalls that the keystone was the exclusiveness of the remedy. This concept emerged from a balancing of the sacrifices and gains of both employees and employers, in which the former relinquished whatever rights they had at common law in exchange for a sure recovery under the compensation statutes, while the employers on their part, in accepting a definite and exclusive liability, assumed an added cost of operation which in time could be actuarially measured and accurately predicted; incident to this both parties realized a saving in the form of reduced hazards and costs of litigation. As stated by Mr. Justice Brandeis in *Bradford Electric Co.* v. *Clapper*, 1932, 286 U.S. 145, 159, 52 S. Ct. 571, 576, 76 L. Ed. 1026, the purpose of these laws was to provide "not only for the employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and de-

terminative." Thus, anything that tends to erode the exclusiveness of either the liability or the recovery strikes at the very foundation of statutory schemes of this kind, now universally accepted and acknowledged.

* * * * * * * * *

In 1949 Congress amended the Federal Employees Compensation Act by inserting an exclusive liability clause the same, in all material aspects, as Section 5 of the Longshoremen's and Harbor Workers' Act. The purpose of this amendement was "to make it clear that the right to compensation benefits under the act *is exclusive and in place of any and all* other legal liability of the United States or its instrumentalities * * *." S. Rep. No. 836, 81st Cong., 1st Sess. 23 (1949). U.S. Code Cong. Service 1949, p. 2135. (Emphasis added.) From this background it can be seen Congress was necessarily interested in the employers' immunity to suits as well as in the employees' right to recovery.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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